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JOHN E. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1951 Misc.

WILLIAM J. LEVENTHAL,
PETITIONER,

v.

JOHN A. GAVIN, as he is Commissioner, Department of Correction, Commonwealth of Massachusetts,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

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Blanchard Press, Inc., Boston, Mass. — Law Printers

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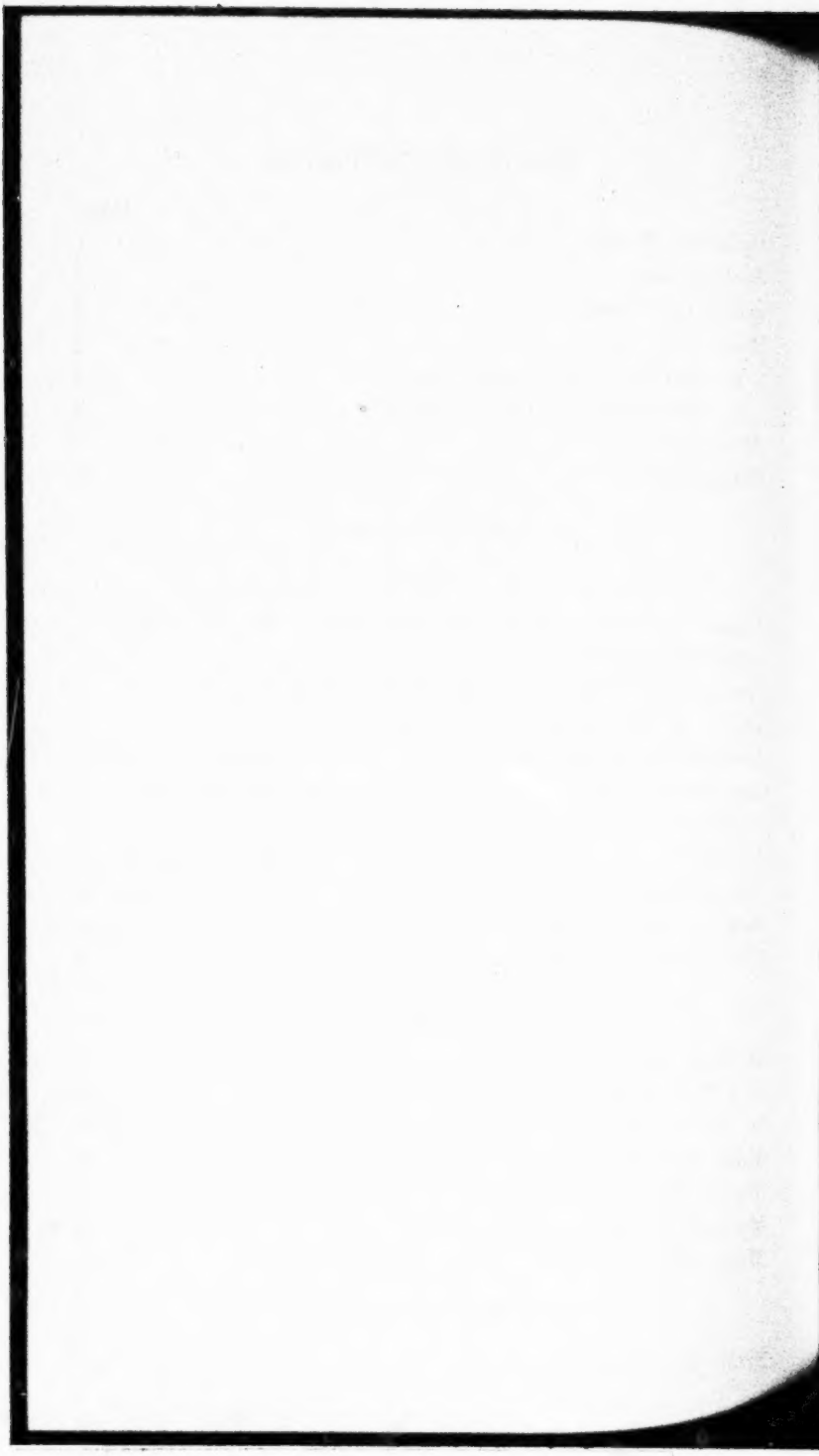
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Opinions Below

The opinion of the Court of Appeals (Pet. App. A) is not yet reported. The opinion of the District Court (A. 141-153)[1] is not reported. The opinion of the Massachusetts Supreme Judicial Court is reported at 352 Mass. 428, 225 N. Ed.2d 911.

[1] References are to the Appendix ("A") in the Court below which has been filed with the Clerk of this Court.

Jurisdiction

The judgment of the Court of Appeals was entered on January 22, 1970. The Petition for a Writ of Certiorari was filed on April 1, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Question Presented

Whether the court below properly held that petitioner failed to properly establish a claim that he was denied an appeal in violation of the Sixth Amendment to the United States Constitution.

Statement

After a jury trial, William J. Leventhal (hereinafter "petitioner") was convicted in the Suffolk County Superior Court on ninety-one counts of larceny exceeding $100 in violation of Mass. Gen. Laws, ch. 266, § 30; ninety one counts of making false entries in corporate books with intent to defraud in violation of Mass. Gen. Laws, ch. 266, § 67, ninety-one counts of fraudulent use of corporate credit in violation of Mass. Gen. Laws. ch. 266, § 74; and conspiracy. On May 12, 1965, he was sentenced to imprisonment from five to seven years. No appeal was perfected from those convictions. On November 12, 1965, petitioner filed a motion for a new trial with the Suffolk County alleging that counsel, through mistake or inadvertence, had failed to take the steps necessary to perfecting an appeal. That motion, after a hearing, was denied by the trial court, and the Massachusetts Supreme Judicial Court affirmed. *Commonwealth* v. *Hamblen*, 352 Mass. 438, 225 N.E. 2d 911 (1967).

On March 1, 1968, petitioner filed a Petition for Writ

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of Habeas Corpus in the United States District Court for the District of Massachusetts. The petition was dismissed without a hearing. On appeal the court below, in a *per curiam* opinion, vacated the order of dismissal and remanded for an evidentiary hearing, on the ground that the record was not clear as to whether or not the district court judge had reviewed the state court record. *Leventhal* v. *Gavin,* 396 F.2d 441 (1st Cir. 1968). After an evidentiary hearing, the district court denied the petition. *Leventhal* v. *Gavin,* Misc. Civil No. 68-24-G (A. 141-153). The court below affirmed.

The relevant evidence was developed in both the state court and the distirct court, and will be discussed separately.

1. *State Court Proceedings:*

A. In his motion for a new trial, petitioner alleged that his trial counsel, through mistake or inadvertence, failed to file a bill of exceptions within the time prescribed by law (A. 4). At the hearing, Roy Kipp, Esquire, who represented petitioner at the trial, testified that he had prepared one motion for an extension of time in which to file a bill of exceptions to April 26, 1965[2] (A. 3); that he had prepared a second motion for an extension of time which he gave to his associate, George Reef, Esquire, for filing (A. 11); that on or about May 1, 1965, petitioner asked him for a letter of withdrawal so that he could retain other counsel (A. 9); and that he told petitioner that he (petitioner) would be responsible for future extensions of time (A. 11).

Mr. Reef testified that he had left the second motion for an extension of time with Murray Reiser, Esquire, Assistant District Attorney of Suffolk County, for filing

[2] This motion was filed on March 26, 1965 (A. 2).

(A. 13, 15-17, 18-24, 25-26). Mr. Reef further testified that on or about April 21, 1965, petitioner was told that it was up to him (petitioner) to get counsel to have further motions for extensions of time filed (A. 25).

Mr. Reiser, in lieu of oath, made a statement for the record that, although he assented to the further extension of time requested by Mr. Reef, he did not promise to file the same in court, and that the original motion was not left with him (A. 29-30).

Other evidence reflected in the docket entries showed that on March 11, 1965, one day after the verdict was returned, petitioner moved that the trial be subject to the provisions of Mass. Gen. Laws, ch. 278, §§ 33 A-33G, allowing for appeal on the transcript instead of by way of bill of exceptions; that the motion was taken under advisement; and that there was no attempt to file an appeal under those provisions (A. 2-3). The docket entries further reflected that the next action taken on petitioner's behalf in an attempt to perfect an appeal was on Sepember 24, 1965, when new counsel filed a motion for an extension of time in which to file a bill of exceptions; that that motion was originally granted, but was thereafter revoked (A. 2).

B. At the conclusion of the hearing, the trial court concluded that the failure to file further motions for extensions of time was attributable to petitioner, and not to his retained counsel (A. 35). The trial court accordingly denied the motion for a new trial. On appeal, the Massachusetts Supreme Judicial Court approved the findings of the trial court, and affirmed the denial of the motion for a new trial.

2. *Federal Court Proceedings:*

A. At the evidentiary hearing held in the United States District Court for the District of Massachusetts, Mr.

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Reef again testified at petitioner's behest. This time, with the aid of his diary,[3] Mr. Reef testified that on April 23, 1965, Mr. Kipp advised petitioner that they would no longer represent him in the matter (A. 65-67). Mr. Reef also repeated his earlier testimony to the effect that he left the second motion for an extension of time with the Assistant District Attorney for filing (A. 55-56).

Miss Edna Duncan, also called at petitioner's behest, testified that at the April 23, 1965, meeting, Mr. Kipp told petitioner that he would no longer represent him, and that petitioner responded, "All right": (A. 89-91).

Petitioner, in his own behalf, corroborated Miss Duncan's testimony, and testified that he asked for a letter of withdrawal on May 1, 1965 (A. 96-98). He further testified that at the May 1 meeting, Mr. Kipp had told him that the second motion for an extension of time had been filed, and that a third one would have to be filed if an extension beyond May, 1965, was desired (A. 99-100); and that he first learned that the second motion for an extension of time had not been filed on June 2, 1965 (A. 74).

On behalf of the Commonwealth, Mr. Kipp, this time aided by notes taken in his legal diary, testified that on April 22, 1965, he advised petitioner that he would no longer represent him, and that it would be incumbent upon petitioner to file a second motion for an extension of time before Monday, April 26, 1965. According to Mr. Kipp, petitioner stated that he would file the second motion (A. 118, 119). Mr. Kipp reiterated that he would no

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[3] At the hearing on the motion for a new trial, Mr. Reef and Mr. Kipp were subpoenaed to appear with no advance notice as to the nature of the motion. They were thus without benefit of diaries to recall crucial dates occurring some six months previous to the hearing. Counsel for petitioner stated that he did not desire to probe further into the dates, but that he was content with the testimony (A. 28-29).

longer represent petitioner on the following day, April 23, 1965 (A. 117).

At a continuation of that hearing in the district court, Earl Auerbach, Esquire, who represented petitioner on the motion for a new trial, testified at petitioner's behest that he first entered an appearance on behalf of petitioner on May 5, 1965; that petitioner had advised him that they had until May 26 or 27 to file a bill of exceptions or a motion for extension of time; and that Mr. Kipp had advised him similarly (A. 128-130).

On rebuttal, Mr. Kipp agreed that he had told Mr. Auerbach that he had until May 26 to file a bill of exceptions or a motion for extension of time, but further testified that he had told Mr. Auerbach that on the assumption that peitioner filed the second motion for an extension of time as petitioner had promised (A. 133-136).

B. At the conclusion of the hearing the district court ruled that the determination of the state court—i.e., that the failure to perfect an appeal was not attributable to counsel—was fairly supported by the evidence presented at the motion for a new trial, and was further supported by the evidence produced in the federal court hearing (A. 142-149). The district court further found that petitioner *believed* that the time within which to file a bill of exceptions had been extended to May 26, 1965 (A. 150); that what petitioner lost was, at best, an opportunity to file a third motion for an extension of time—a matter wholly discretionary with the Supreme Judicial Court; that petitioner never had a present intention to appeal (A. 146-148, 152); and that there was no evidence—and indeed, no allegation—of fraud or deception by petitioner's trial counsel (A. 151, 153). The district court accordingly denied the petition for a writ of habeas corpus.

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Argument

1. The two courts below properly concluded that the state court records justified the finding that it was petitioner—and not his trial counsel—who occasioned the loss of an appeal. Under the provisions of 28 U.S.C. 2254(d), findings of fact made during the course of state court proceedings are to be presumed correct unless it can be shown, *inter alia,* that the findings are not fairly supported by the record. The evidence before this state trial judge amply supported his written conclusion that the loss of appeal was attributable solely to petitioner's own conduct (A. 32). At the hearing on the motion for a new trial, counsel testified—at petitioner's behest—that he [petitioner]had asked for a letter of withdrawal, and that he had told petitioner that he [petitioner] would be responsible for future extensions of time. Similar testimony was given by co-counsel who had represented petitioner at trial. Moreover, other evidence before the state trial judge clearly showed that petitioner never intended to appeal, but simply wished to keep his options open indefinitely. Thus, although a motion filed for an appeal under the provisions of Mass. Gen. Laws, ch. 278, §§ 33A-33G [allowing for appeal on the entire transcript rather than by way of a bill of exceptions], petitioner never followed through on that motion. Moreover, the trial judge recalled that petitioner constantly interfered with the efforts of his counsel (A. 32, 33, 34-35). In these circumstances, the evidence warranted the finding by the state trial judge that the loss of the right to an appeal was occasioned solely by petitioner's conduct, not that of counsel, and the two courts below properly treated that finding as presumptively correct under the provisions of 28 U.S.C. 2254(d).

2. As pointed out above, petitioner, for the first time in the federal district court, testified that he *believed* that

his counsel were perfecting an appeal. The court below disregarded that testimony in its assessment of the case because he never so testified in the state courts. In our view, the court below properly refused to consider the impact of that testimony. Under the provisions of 28 U.S.C. 2254(b), a petition for a writ of habeas corpus should not be entertained unless the petitioner has exhausted his available state remedies. The court below has previously held that the statutory exhaustion principle means that an applicant should not be heard, in a federal habeas corpus proceeding, to urge constitutional error on the part of state courts on the basis of facts which were never presented to that court. *Needel* v. *Scafati*, 412 F.2d 761 (C.A. 1), certiorari denied, 6 Crim. L. Rept. 4017. That principle is particularly applicable to the present case. In the state courts, petitioner never contended that he was misled by his counsel, and he never so testified. He simply relied upon the fact that the appeal was never perfected within the statutory time limit, and urged that this fact—standing alone—amounted to constitutional error. Thus, the court below properly refused to second-guess the findings made by the state trial judge on the basis of facts which were withheld from his consideration.

3. In any event, petitioner failed to state a claim upon which relief could be granted. In his motion for a new trial before the state court, petitioner alleged that mistake and inadvertence on the part of trial counsel occasioned the loss of an appeal. (A. 4). The same allegations were made in his Petition for a Writ of Habeas Corpus (A. 42-47).

It is well settled that the federal habeas corpus remedy does not do the service of an appeal, but is meant only to correct those errors reaching constitutional or jurisdictional dimension. E.g., *Sunal* v. *Large*, 332 U.S. 174 cf. *Hill* v. *United States*, 368 U.S. 424. To our knowledge no court has held that mistake or inadvertence of counsel—

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standing alone—amounts to ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution. Indeed, this Court has implicitly held to the contrary in ruling that mere inadvertence of trial counsel to file a notice of appeal within the statutory time limit precludes a later appeal, and does not call for future judicial corrective relief. *United States* v. *Robinsin*, 361 U.S. 220. Petitioner has neither alleged nor shown any fraud, deception, or overreaching, on the part of retained trial counsel, and the district court specifically found none (A. 151, 153).[4] Thus *Desmond* v. *United States*, 333 F.2d 378 (C.A. 1), and like cases cited by petitioner, are inapposite to the facts and circumstances present in this case. In these circumstances, the district court properly dismissed the petition for a writ of habeas corpus on the further ground that petitioner failed to establish a ground upon which relief could be granted.

Conclusion

For the reasons stated above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[4] If petitioner is now suggesting fraud or deception on the part of retained counsel, that is appropriately a matter—under general considerations of comity, as well as the clear Congressional command of 28 U.S.C. 2254(d)—to first be raised in the state courts, and not this Court. *Needel* v. *Scafati*, 412 F.2d 761 (C.A. 1), certiorari denied, 6 Crim. L. Rept. 4017.